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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DONALD ISIAH HUGHES, Defendant and Appellant.	H022733 (Santa Clara County Super. Ct. No. CC080785)

Defendant Donald Isiah Hughes challenges the denial of presentence custody credits against his three-year prison sentence on charges of possessing narcotics for sale. He asserts that his revocation of parole was for the same conduct as the new charge so he is entitled to dual credits under *People v. Bruner* (1995) 9 Cal.4th 1178 (*Bruner*).

FACTS

Because defendant pled guilty to the charges and admitted the violation of probation, the facts are taken from a report to the Board of Prison Terms. On August 4, 2000, San Jose police officers working the Metro Unit received information that defendant possessed a large quantity of crack cocaine and that he was staying at the Crowne Plaza Hotel on Almaden Boulevard in San Jose. As the officers went to defendant's room, they saw co-defendant Darryl Fultcher step out of the room smelling strongly of marijuana. The officers searched Fultcher and found 15 grams of marijuana, a large white cocaine base "rock," a cell phone, an electronic scale, and $680 in cash.

Defendant remained inside the room. The officers knocked on the door of the room and defendant opened it. Three other persons were there. A search of the room yielded 8 grams of marijuana, 14 grams of cocaine base, a cell phone, a pager, and $25 in cash. Defendant was under the influence of cocaine. In the opinion of one of the officers, the narcotics were possessed for sale. Defendant had a parole condition not to possess or have access to pagers or cellular phones.

Defendant was charged with and pled guilty to possession of cocaine base for sale, possession of marijuana for sale, and being under the influence of cocaine. (Health & Saf. Code, §§ 11351.5, 11359, 11550 (a misdemeanor).) An allegation that defendant had previously been convicted of possession of marijuana for sale was stricken at sentencing. (Pen. Code, § 667.5, subd. (b).)[1] Defendant's parole was revoked for possession for sale of cocaine base, for possession for sale of marijuana, for being under the influence of narcotics, and for violation of the parole condition prohibiting possession of pagers and cell phones.

At sentencing, the trial court denied presentence credits for the time defendant spent in custody after his arrest because "if they had not found . . . any drugs, they still would have violated him on the phone or the pager. So I view it as circumstance where there were different circumstances of violation, and I don't believe that the defense has met their burden here to show it was just a single event." After sentencing, defendant filed a motion to correct his sentence by awarding 89 days of actual custody credit and 44 days of section 4019 conduct credits. It was denied. This appeal ensued.

DISCUSSION

Defendant contends he is entitled to presentence credits because he demonstrated that he would not be in custody but for the conduct which led to the charges in this case.

[1] Further statutory references are to the Penal Code unless otherwise stated.

"Penal Code section 2900.5 provides that a convicted person shall receive credit against his sentence for all days spent in custody, including presentence custody (subd. (a)), but '*only* where the custody to be credited is attributable to proceedings related to the *same conduct* for which the defendant has been convicted' (subd. (b), italics added). The statute's application is clear when the conduct that led to the conviction and sentence was the sole cause of the custody to be credited. But difficult problems arise when, as often happens, the custody for which credit is sought had multiple, unrelated causes." (*Bruner*, *supra*, 9 Cal.4th at p. 1180.)

In *Bruner*, while defendant was on parole for armed robbery, a warrant issued for three alleged parole violations based on absconding from parole supervision, credit card theft, and a positive drug test. Parole agents arrested Bruner for these violations. During the search incident to his arrest, a substantial quantity of rock cocaine was found which became the basis for the new charges as well as a fourth ground for revocation of parole. At the time of his arrest, Bruner was cited and released on the cocaine possession, but remained in custody under a parole hold. A month after the arrest, the Board of Prison Terms revoked defendant's parole on the basis of the three earlier violations plus his possession of cocaine at the time of his arrest. A prison term of one year was imposed and Bruner received credit for the time spent in custody between the arrest and the revocation of his parole. (*Bruner*, *supra*, 9 Cal.4th at p. 1181.)

Thereafter, Bruner was charged with cocaine possession and an enhancement based on his prior prison term for robbery. Bruner pled guilty to the cocaine possession, and the trial court struck the enhancement. The court imposed a 16-month sentence for the drug offense which became concurrent by operation of law (§ 669, 2d par.) because the court failed to specify whether the new term was concurrent with or consecutive to the revocation term. The court specifically found that defendant was not entitled to presentence credit. The Court of Appeal reversed the denial of presentence credit and was itself reversed by the Supreme Court. (*Bruner*, *supra*, 9 Cal.4th at pp. 1181-1182.)

The Supreme Court concluded, "when presentence custody may be concurrently attributable to two or more unrelated acts, and where the defendant has already received credit for such custody in another proceeding, the strict causation rules of [*In re*] *Joyner* [(1989) 48 Cal.3d 487] should apply. Here defendant received credit for all presentence custody in his parole revocation proceeding, and he has failed to demonstrate that but for the cocaine possession leading to his current sentence, he would have been free, or at least bailable, during that presentence period. Hence, he is not entitled to duplicative credit against the current sentence." (*Bruner, supra*, 9 Cal.4th at pp. 1180-1181.)

"[P]ost-*Joyner* decisions apply a general rule that a prisoner is not entitled to credit for presentence confinement unless he shows that the conduct which led to his conviction was the sole reason for his loss of liberty during the presentence period. Thus, these cases reason, his criminal sentence may not be credited with jail or prison time attributable to a parole or probation revocation that was based *only in part* upon the same criminal episode. [Citations.] . . . [W]e conclude that these authorities construe the statute correctly." (*Bruner, supra*, 9 Cal.4th at p. 1191, original italics.)

In defendant Hughes's view, the trial court applied the wrong standard in stating the defense had the burden of showing "it was just a single event." He contends the test is whether the parole violation was based on the "same conduct" as the charges which led to his sentence in this case.

It is undisputed that the conduct leading to defendant's criminal and parole revocation proceedings was "a single event" — it occurred at one and the same time and place: he was in possession of both drugs and forbidden electronics in the hotel room on August 4. Defendant asserts that possession of the cell phone and pager were evidence that the drugs were possessed for sale, and therefore, their possession is inextricably linked to the possession for sale charges. In support, he cites a number of cases for the proposition that "beepers or pagers, cellular phones, public pay phones, and the use of codes with beepers are methods commonly used by Colombian cocaine traffickers and dealers"

(*People v. Harvey* (1991) 233 Cal.App.3d 1206, 1216); that "drug traffickers often . . . use . . . beepers and cellular telephones to keep in touch with coconspirators" (*People v. Fernandez* (1989) 212 Cal.App.3d 984, 986); that "[i]n 50 major cases investigated in the past year, [Detective] Bitterolf could not recall a single one in which a beeper or pager device was not recovered at the location where the narcotics were found" (*People v. Carvajal* (1988) 202 Cal.App.3d 487, 496); and that " '[t]he pager and cell-phone are commonly used by drug traffickers to conduct business' " (*People v. $28,500 United States Currency* (1996) 51 Cal.App.4th 447, 454).

Plaintiff rebuts, "[a]lthough beepers and cell phones are consistent with narcotics activity and are commonly used by drug traffickers to conduct business, the fact remains that possession of a cell phone and pager is not the same conduct as possession of cocaine or marijuana for sale. Except for the fact that it was a special condition of parole that [defendant] not possess a cell phone and pager, he would not have been returned to prison for possession of those items." Plaintiff concludes that "[s]ince the conduct which led to [defendant's] conviction was not the sole reason for his loss of liberty during the presentence period, his claim should fail."

"One conditionally free on parole or probation after his conviction for a prior crime carries a disability not applicable to other persons. If he commits any new offense, he is obviously subject to a new criminal conviction and sentence. But his new violation of law may independently be grounds for his incarceration based on the revocation of his existing parole or probation.

"It is common that the same new offense committed while on parole or probation will figure in separate criminal and revocation proceedings, and this is entirely appropriate. Not only has the parolee or probationer broken the law anew, but he has betrayed the conditional trust placed in him and demonstrated, even before a prior brush with the law is complete, that he has not been deterred.

"It is often also true that a parolee or probationer would have been remanded to custody for reasons entirely unrelated to the new offense, even though the new crime also constitutes 'a' basis for such restraint. The facts of this case [*Bruner*] illustrate the point. When arrested by parole agents, defendant had already committed a flurry of violations for which his parole had been suspended. These violations alone amply demonstrated his unsuitability for parole and made a revocation term probable entirely apart from the last-minute cocaine charge which later led to his criminal conviction.

". . . In our view, neither the words nor the history of section 2900.5 implies that separately imposed criminal and revocation terms based on unrelated conduct should collapse into one simultaneous term whenever it happens that there was some common factual basis for both proceedings." (*Bruner, supra,* 9 Cal.4th at pp. 1192-1193.)

The facts of *Bruner* illustrate that "unrelated" conduct is conduct that occurred at a different time and place as the criminal offense. In our case, defendant's possession of drugs and electronics was part of the same course of conduct. The cases defendant cites are clear that possession of such electronics may be used as evidence of an intent to sell the simultaneously possessed contraband. Consequently, when defendant was arrested for that conduct and it resulted in both criminal and parole revocation proceedings, "[i]t is common that the same new offense committed while on parole or probation will figure in separate criminal and revocation proceedings, . . ." (*Bruner, supra,* 9 Cal.4th at p. 1193.) Therefore, even though defendant could have been held in custody for violation of the parole special condition forbidding possession of the electronic devices even if he had been released on his own recognizance or bailed out on the new criminal charges, that fact does not transform one course of conduct into unrelated courses of conduct.

The statute clearly says "[f]or the purposes of this section, credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted." (§ 2900.5, subd. (b).) Defendant's parole was revoked for the three new crimes and possession of the forbidden electronic devices.

However, the possession of the electronics occurred during the commission of the new crimes and was part of the commission of the new crimes. He is entitled to presentence credits.

Defendant's motion to correct his sentence states the number of days' credit he seeks. However, since "[t]he record on appeal . . . does not contain competent evidence of the duration of defendant's incarceration. . . , we are unable to resolve this matter, and must remand the matter to the trial court." (*People v. Wischemann* (1979) 94 Cal.App.3d 162, 175.)

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court for a calculation of the credit for time served.

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Premo, Acting P.J.

WE CONCUR:

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Elia, J.

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Mihara, J.